Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM 1996

HERMAN MICHAEL SZMALEC
PETITIONER

v.

THE STATE OF TEXAS
RESPONDENT

Petition For Writ of Certiorari
To The Court Of Appeals For The
Fourteenth District Of Texas

PETITION FOR WRIT OF CERTIORARI

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50 pp

QUESTIONS PRESENTED

1. Whether a defendant who makes a custodial statement after being given a portion of his Miranda warnings may be impeached with his later failure to continue making statements?

2. Whether a defendant who is given only a portion of his Miranda warnings following his arrest may be impeached with his postarrest silence?

IDENTIFICATION OF PARTIES

The parties to this case are:

1. Herman Michael Szmalec, Petitioner-Defendant.

    a. Tom Moran, Appellate Attorney for Petitioner.

    b. R.H. Bielstein, Appellate Attorney for Petitioner.

2. The State of Texas, Respondent-Plaintiff.

    a. The Hon. John B. Holmes, Jr., in his official capacity as District Attorney of Harris County, Texas, Attorney for the State of Texas.

    b. The Hon. Dan Morales, in his official capacity as Attorney General of Texas, Attorney for the State of Texas.

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SUP. CT. R. 12 1

TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

COMES NOW HERMAN MICHAEL SZMALEC, Petitioner herein, by and through his attorneys, **TOM MORAN and R.H. BIELSTEIN,** and pursuant to SUP. CT. R. 12 files this petition for writ of certiorari to the Court of Appeals for the Fourteenth District of Texas and in support thereof, would show the Court as follows:

I. STATEMENT OF JURISDICTION

This is a petition for writ of certiorari in the direct appeal of a criminal conviction. Petitioner's conviction was affirmed by the Court of Appeals for the Fourteenth District of Texas in an opinion filed on July 11, 1996. Szmalec v. State, 927 S.W.2d 213 (Tex. App.--Houston [14th Dist.] 1996, pet. ref'd).[1] Petitioner filed a timely petition for discretionary review with the Texas Court of Criminal Appeals.[2]

The Court of Criminal Appeals denied discretionary review on December 11, 1996, without publishing a written order.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

This petition for writ of certiorari is due on March 11, 1997, the 90th day after the Court of Criminal Appeals denied review.

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[1] This opinion is attached as Appendix A and is hereinafter referred to as Szmalec II.

[2] The Court of Criminal Appeals is the highest court in Texas with criminal jurisdiction. TEX. CONST. art. V, § 5.

II. CONSTITUTIONAL PROVISIONS INVOLVED

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. CONST. amend. V.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. CONST. amend XIV, § 1.

III. STATEMENT OF THE CASE

This is a direct appeal from a conviction for murder. Following a jury trial, Petitioner was convicted of murder and the jury assessed his punishment at 10 years confinement in the Institutional Division of the Texas Department of Criminal Justice, probated, and a $10,000 fine.

He filed a timely notice of appeal and alleged, among other issues, that he was deprived of effective assistance of counsel as guaranteed by U. S. CONST. amend. VI and TEX. CONST. art. I, § 10.

The Court of Appeals affirmed in an unpublished opinion issued on September 7, 1995. Szmalec v. State, No. 14-93-00194-CR (Tex. App.--Houston [14th Dist.] September 7, 1995).[3] The Court of Criminal Appeals granted discretionary review, vacated the judgment of the Court of Appeals and remanded for reconsideration.[4]

The issues presented in this petition were presented to the Court of Appeals in the form of points of error alleging ineffective assistance of counsel for failure to object to the prosecutor's attempts to impeach Petitioner with his postarrest silence. The Court of Appeals considered the Fifth Amendment issue and found no error. See Szmalec II, 927 S.W.2d at 216.

Specifically, the Court of Appeals held that because the record did not reflect that Petitioner had been given the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966), there was no federal constitutional error.

However, the record in fact does reflect that Petitioner was given a portion of his Miranda warnings moments after he was arrested. See S.F. I-176.[5]

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[3] This unpublished opinion is attached as Appendix B.

[4] This order is attached as Appendix C.

[5] At this point in the record, the arresting police officer, Officer Tubbs, testified that he warned Petitioner that he had the right to remain silent and the right to an attorney. Officer Tubbs further testified at this point that he made no attempt to interrogate Petitioner.

IV. REASONS FOR GRANTING REVIEW

This petition presents the issue of whether warning a suspect in custody that he has the right to remain silent and the right to an attorney is sufficient to trigger the implied guarantee recognized in Doyle v. Ohio, 426 U.S. 610 (1976), that his silence will not be used against him. It also presents the issue of whether a suspect in custody, having begun to speak to police after being warned of his right to silence and his right to an attorney, may be impeached with his later silence.

The issues presented for review are ancillary to the ultimate question of whether Petitioner was deprived of his right to effective assistance of counsel. However, because the issues presented form the basis of the ineffective assistance of counsel claim, the Court of Appeals' holding that there was no constitutional error formed the basis for rejecting the ineffective assistance of counsel claim. Therefore, the sole relief sought by Petitioner here is a determination that the Court of Appeals erred in holding that Petitioner was not improperly impeached with his postarrest silence.

If this Court grants review and determines that the cross examination was constitutionally improper, on remand the Texas courts should determine the ultimate question of whether counsel was ineffective.

A. Statement of Relevant Facts

With the single exception of the factual statement concerning the partial Miranda warnings given to Petitioner by the arresting officer, this statement of facts is based on the opinion of the Court of Appeals in Szmalec II.

On June 9, 1991, Petitioner shot and killed the complainant, Bruce Wackerie. Petitioner's self defense claim was based on his assertion that the complainant attacked him with a power saw. 927 S.W.2d at 214. At trial, Petitioner testified that he asked Officer Tubbs to hold the saw as evidence. 927 S.W.2d at 215.

Included in direct examination was the following:

Q: Did you tell any of the police officers about the saw?

A: Yes, I did.

Q: Which one of the police officers did you tell about the saw?

A: Officer Tubbs.

Q: Which one was Officer Tubbs?

A: He was the officer that arrested me, came over to my apartment and took the gun?

Q: What did you tell Officer Tubbs?

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A: I told him that -- Well, he asked me if I had Bruce willingly or not and I kind of said, asked him what do you mean by willingly. I mean, I didn't want to shoot.

Q: What else did you tell him?

A: I asked him to take the saw into evidence.

Q: What was his response to that?

A: He said that the investigators on the scene were professionals and they would take care of that.

Q: Were you interviewed by any of the other officers that day?

A: No, I was not.

927 S.W.2d at 217.

Officer Tubbs had previously testified that he did not remember Petitioner asking him to hold the saw. Id. However, although not mentioned by the Court of Appeals in its opinion, Officer Tubbs also testified that he warned Petitioner that he had the right to remain silent and the right to an attorney. He also testified that he did not interrogate Petitioner. S.F. I-176.

On cross examination of Petitioner, the State asked numerous questions concerning his failure to ask other officers to impound the saw as evidence. See, e.g., 927 S.W.2d at 215-16, which includes the following excerpt from cross examination:

> Q: Now, wouldn't you agree with me, sir, that if somebody was trying to kill you and you had to kill them in self defense, that it would be reasonable to tell witnesses that came around that the person tried to kill you and you had to kill him first? Wouldn't that be the reasonable thing to do?
>
> A: I don't know if you know what it's like in that situation.
>
> Q: Sir?
>
> A: I don't know if --
>
> Q: Wouldn't it be?
>
> A: No.
>
> Q: You don't agree that that would be a reasonable thing to do?
>
> A: No. I don't think you just go and start blabbing.
>
> Q: You don't agree that would be a reasonable thing to do; correct?
>
> A: The thing to do is --

****

Q: Wouldn't you agree that that would be a reasonable thing to do?

A: What thing?

****

Q: Now, you indicated that you told officer (sic) Tubbs about a saw.

A: Yes, I did.

Q: Now, Officer Tubbs wasn't the only police officer that you came into contact with that day?

A: No, it wasn't.

Q: In fact, you came into contact with Officer Williams who did the atomic absorption test on your hands, isn't that correct?

A: Yes, that's correct.

Q: And you didn't say anything to him about this guy coming at you with saw, did you?

A: No, I didn't.

Q: You didn't say anything to Sergeant Anderson or Sergeant Ferguson about this guy coming at you with a saw, did you?

A: I don't recall any Anderson and Ferguson.

Q: When you were being transported downtown, you didn't say anything about the guy coming at you with a saw, did you?

A: No, I didn't.

Q: When you got downtown to the homicide division, you didn't say anything to any police officer about Mr. Wackerie coming at you with a saw, did you?

A: No, I didn't.

Q: Don't you believe -- Wouldn't you agree with me, Mr. Szmalec, that it would be reasonable for someone in that situation to continually let it be known that they acted in self-defense? Wouldn't you agree with that, sir?

A: I had no one to talk to.

B. Partial Warnings: Are They Sufficient To Trigger Doyle?

In Doyle, this Court recognized that when a police officer reads a suspect his Miranda warnings to remain silent, to have an attorney present during any interrogation and to end interrogation at any time, the warnings carry with them the implied guarantee that exercise of those rights will be without cost to the suspect. Therefore, this Court has held that a defendant may not be impeached with postarrest, post-Miranda silence.

The holding in Doyle, however, is based not on the constitutional rights that are the subject of the Miranda warnings but rather on the implied promise that comes with the warnings that the exercise of those rights will not be used against the suspect in a later trial. Therefore, in Fletcher v. Weir, 455 U.S. 603 (1982), this Court held that a defendant may be impeached with postarrest, pre-Miranda silence.

The instant case falls squarely between Doyle and Fletcher. Prior to any questioning, Officer Tubbs had warned Petitioner of his right to remain silent and his right to counsel. The question presented therefore is whether partial postarrest Miranda warnings are sufficient to carry with them the implied guarantee recognized in Doyle that a suspect's failure to make a statement will not be used against him at trial. This is an issue that has never been decided by this Court. Therefore review is proper pursuant to SUP. CT. R. 10(c), in that the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court.

Petitioner asserts that there is no reason why the warnings given by Officer Tubbs should not be sufficient to trigger the protection of Doyle. Officer Tubbs warned

Petitioner to remain silent. Petitioner made a short statement to Officer Tubbs: Seize the power saw as evidence. After that he said nothing.

The State's impeachment was a clear comment on Petitioner's failure to continue speaking, his failure to make the same statement to other police officers at a later time.[6]

Therefore, this Court should grant review, hold that the State improperly impeached Petitioner with his postarrest silence and remand to the Court of Appeals for the Fourteenth District of Texas for a determination of whether the failure to object to that cross examination constituted ineffective assistance of counsel.[7]

C. Impeachment With Silence After Making a Statement

In Anderson v. Charles, 447 U.S. 404 (1980), this Court held that Doyle does not protect a defendant who makes a custodial statement from being impeached with inconsistencies between that statement and his trial testimony. The fact that each of the two statements omits facts included in the other is not "silence" for purposes of Doyle. 447 U.S. at 409.

However, this case presents another issue, Petitioner's failure to continue speaking after he has once begun making a postarrest statement. This case is legally identical with

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[6] The record reflects that those officers never interrogated Petitioner. Thus, not only was Petitioner impeached with postarrest, post partial-Miranda silence but he was impeached with his postarrest, post partial-Miranda failure to seek out police officers to make a statement.

[7] Alternatively, this Court may grant review and summarily remand with instructions that the Court of Appeals determine whether Officer Tubbs had in fact given Petitioner partial Miranda warnings.

United States v. Canterbury, 985 F.2d 483 (10th Cir. 1993), where the court reversed a conviction because the prosecutor impeached the defendant with his failure to include in his custodial interrogation a statement that was not inconsistent with his trial testimony. The court stated:

> The inference suggested by the line of questioning is that Canterbury was guilty because an innocent person would have presented the set-up theory to the arresting officers. The focus of the examination was not inconsistent stories as in Charles, but on Canterbury's failure to present his exculpatory story at the time of arrest. Because the examination was designed to discredit the defendant's trial testimony by drawing attention to his post-arrest silence, it was a violation of his due process rights under Doyle.

985 F.2d at 486.

The Canterbury Court could have been writing the opinion in the instant case. The focus of the cross examination in the instant case was not on inconsistent stories but rather on the failure of Petitioner not only to make a statement but to shout it from the rooftops.

The focus of the prosecutor's cross examination in the instant case was Petitioner's failure to repeat the statement he had made to Officer Tubbs. Thus, the Court of Appeals not only allowed the State to impeach Petitioner with his failure to repeat his statement but also allowed it in effect to place on him a burden of continuing to speak after his arrest. This is inconsistent with Doyle and Canterbury.

For these reasons, this Court should grant certiorari, reverse the Court of Appeals and remand this case for further proceedings.

D. Conclusion

In the instant case, the Court of Appeals necessarily held that the failure of a police officer to give a person in custody his full Miranda warnings is equivalent to giving him none of his Miranda rights. Thus, the court held that the State could use his failure to continue making statements as an incident against him during cross examination. This flies in the face of the policy underlying Doyle and of logic. The Doyle rationale was that the Miranda warnings carry with them an implied guarantee that the defendant's silence will not be used against him later at trial.

Here, Petitioner, after being warned of his right to remain silent and his right to an attorney, asked a police officer to seize physical evidence. After that, he apparently was not interrogated nor did he volunteer any further statements to the police. Nothing Petitioner said at his trial was inconsistent with either his postarrest, post partial-Miranda statement to Officer Tubbs or his later failure to make additional statements (whether called upon to do so or not).

This Court should summarily grant certiorari, reverse the Court of Appeals, hold that the State improperly impeached Petitioner with his postarrest failure to make a statement and remand for further consideration of Petitioner's ineffective assistance of counsel claim.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court grant his petition for certiorari, order full briefs and oral arguments and reverse the Court of Appeals for the Fourteenth District of Texas or, in the alternative, grant certiorari, summarily reverse the Court of Appeals and remand for further consideration.

Respectfully submitted,

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APPENDIX A

Herman Michael SZMALEC, Appellant,
v.
The STATE of Texas, Appellee
No. 14-93-00194-CR.

Court of Appeals of Texas,
Houston (14th Dist.).

July 11, 1996.

Defendant was convicted in the District Court, Harris County, Patricia Lykos, J. of murder. Defendant appealed. The Court of Appeals affirmed. The Court of Criminal Appeals, granted defendant's petition for discretionary review, and remanded matter for consideration of whether defense counsel was ineffective for failing to object to cross-examination concerning defendant's postarrest, pre-*Miranda* silence. On remand, the Court of Appeals, Lee, J., held that defendant opened door to prosecutor's cross-examination by testifying that he told arresting police office to take victim's alleged weapon into evidence.

Affirmed.

1. Criminal Law ¶641.13(1)

Ineffective assistance claim requires that defendant show both that her counsel's representation fell below objective standard of reasonableness, based on prevailing professional norms, and that there is reasonable probability that, but for counsel's unprofessional errors, result of proceedings would have been different. U.S.C.A. Const.Amend.6

2. Criminal Law ¶641.13(1)

Judicial scrutiny of counsel's performance, pursuant to ineffective assistance claims, must be highly deferential; court must indulge strong presumption that counsel's conduct falls within wide range of reasonable professional assistance. U.S.C.A. Const.Admend. 6.

3. Criminal Law ¶ 641.13(1)

Ineffective assistance claim cannot be demonstrated by isolating one portion of counsel's representation. U.S.C.A. Const. Admend. 6.

4. Criminal law ¶ 641.13(1)

To determine whether defendant received effective assistance, counsel's performance must be judged on totality of representation. U.S.C.A. Const.Amend.6.

5. Criminal Law ¶ 641.13(1)

Claim of ineffective counsel can only be sustained if it is firmly grounded in record. U.S.C.A. Const.Admen.6.

6. Witness ¶ 347

Once accused is advised of his rights under *Miranda*, and invokes his right to remain silent, state cannot impeach him with his silence. U.S.C.A. Const.Amend.5.

7. Criminal Law ¶ 407(1)

When defendant is arrested, he has the right to remain silent and the right to not have that silence used against him regardless of when he is advised of his rights.

8. Witness ¶ 349

Defendant opened door to prosecutor's cross-examination about his postarrest, pre-**Miranda** silence by testifying that he told arresting police office to take victim's alleged weapon into evidence.

R.H. Beilstein, Richmond, Tom Moran, Houston, for appellants,

Rikki Burke Graber, Houston, for appellee.

Before LEE, AMIDEL and EDELMAN, JJ.

OPINION ON REMAND

LEE, Justice.

Appellant entered a plea of not guilty before a jury to the offense of murder. TEX PENAL CODE ANN. 19.02 (Vermont 1994). He was convicted and the jury assessed punishment at imprisonment for 10 years, probated, and a $10,000 fine. On original submission, we affirmed the

judgment of the trial court. *See Szmalec v. State*, No. 14-93-00194-CR, 1995 WL 529626 (Tex.App.-Houston [14th Dist.] September 7, 1995)(not designated for publication). Appellant filed a petition for discretionary review with the court of criminal appeals. His petition was granted and the court remanded the matter for us to consider whether appellant's trial counsel was deficient for failing to object to cross-examination by prosecutor on appellant's post-arrest, pre-*Miranda* silence under the Texas Constitution. Once again we affirm.

On June 9, 1991, appellant shot and killed Bruce Wackerle. At trial, he claimed that he acted in self-defense. He testified that Wackerle came by his house in the morning and asked to talk to him. Appellant talked with his girlfriend for a while and then went to see Wackerle at Wackerle's near-by house. Because Wackerle had threatened him on several occasions, he took a pistol with him. When he arrived, Wackerle was sawing boards with a power saw. After a short conversion, appellant testified that Wackerle attacked him with the saw and appellant responded by shooting him. Appellant further testified that he had no means of retreat and he was acting in self-defense.

[1] In both of his points of error on remand, appellant contends that he did not receive effective assistance of counsel as required by the U.S. and Texas Constitutions. Where an appellant claims that he was denied effective assistance of counsel, we apply the two-prong *Strickland* test. An appellant seeking relief under *Strickland* must demonstrate: 1) counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms: and 2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have different. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. A reasonable

probability is defined as a probability sufficient to undermine confidence in the outcome of the trial. *Miniel v. State*, 831 S.W.2d 310, 323 (Tex.Crim.App.), *cert denied*, 506 U.S. 885, 113 S.Ct. 245, 121 L.Ed.2d 178 (1992). Both prongs of this test must be satisfied for appellant to prevail. *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2046, 80 L.Ed.2d at 693; *Bonilla v. State*, 740 S.W.2d 583, 586 (Tex.App.-Houston [1st Dist.] 1987, pet. ref'd).

[2-5] Judicial scrutiny of counsel's performance must be highly deferential. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. An ineffectiveness claim cannot be demonstrated by isolating on portion of counsel's representation. *McFarland v. State*, 845 S.W.2d 824, 843 (Tex.Crim.App.), *cert denied*, 508 U.S. 963, 113 S.Ct. 2937, 124 L.Ed.2d 686 (1993). Therefore, in determining whether the *Strickland* test has been met, counsel's performance must be judged on the totality of the representation. *Strickland*, 466 U.S. at 696, 104 S.Ct. at 2069, 80 L.Ed.2d at 699. Furthermore, a claim of ineffective counsel can only be sustained if it is firmly grounded in the record. *Cacy v. State*, 901 S.W.2d 691 (Tex.App.-El Paso 1995,pet.ref'd).

To support his points of error, appellant urges that his trial counsel was ineffective for not objecting to the prosecutor improperly questioning him on his post-arrest silence. Appellant testified on direct examination that he asked Officer Tubbs to hold as evidence the saw that Wackerle allegedly used to attack him. Contrary to appellant's contention, earlier during the state's case- in- chief, Officer Tubbs testified that the appellant never made such a request. The prosecution attempted to impeach appellant's testimony as follows:

Q: Now, wouldn't you agree with me, sir, that if somebody was trying to kill you and you had to kill them in self-defense, that it would be reasonable to tell witnesses that came around that the person tried to kill you and you had to kill him first? Wouldn't that be the reasonable thing to do?

A: I don't know if you know what it's like in that situation.

Q: Sir?

A: I don't know if-

Q: Wouldn't it be?

A: No.

Q: You don't agree that that would be a reasonable thing to do?

A: No. I don't think you just go and start blabbing.

Q: You don't agree that would be a reasonable thing to do; correct?

A: The thing to do is-

[discussion between the court and counsel]

Q: Wouldn't you agree that would be a reasonable thing to do?

A: What thing?

Q: To tell the first person when witnesses come around that he tried to kill me and I had to shoot him; I acted in self-defense?

A: No.

Q: Now, when you got back to your apartment you didn't called 911, did you?

A: No.

Q: You didn't ask [your girlfriend] to call 911, did you?

A: No.

Q: You didn't care whether Mr. Wackerle laid there and died or not, did you, Mr. Szmalec?

A; Yes, I did care.

Q: Now, you indicated that you told officer Tubbs about a saw.

A: Yes, I did.

Q: Now, Officer Tubbs wasn't the only police officer that you came into contact with that day, was it?

A: No, it wasn't.

Q: In fact, you came into contact with Office Williams who did the atomic absorption test on your hands; is that correct?

A: Yes, that's correct.

Q: And you didn't say anything to him about this guy coming at you with a saw, did you?

A: No, I didn't.

Q: You didn't say anything to Sergeant Anderson or Sergeant Ferguson about the guy coming at you with a saw, did you?

A: I don't recall any Anderson or Ferguson.

Q: When you were being transported downtown, you didn't say anything to that officer about the guy coming at you with a saw, did you?

A: No, I didn't.

Q: When you got downtown to the homicide division, you didn't say anything to any police officer about Mr. Wackerle coming at you with a saw, did you?

A: No, I didn't.

Q: Don't you believe-Wouldn't you agree with me, Mr. Szmalec, that it would be reasonable for someone in that situation to continually let it be known that they acted in self-defense? Wouldn't you agree with that, sir?

A: I had no one to talk to.

Appellant argues these questions were an impermissible comment on his post-arrest silence which should have been objected to by his trial counsel.

[6] Once an accused is advised of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct.L.Ed2d 694 (1966), and invokes his right to remain silent, the Fifth Amendment to the U.S. Constitution prevents the state from impeaching him with his silence. *Cisneros v. State*, 692 S.W.2d 78, 84 (Tex.Crim.App.1985); *see also Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). In his initial appeal to this court, quoting *Cisneros*, we stated that the Fifth Amendment "is not violated when a defendant, who testifies in his own defense, is impeached with his prior silence. Impeachment follows the defendant's own decision to cast aside his cloak of silence and advance the truth-finding function of the criminal trial." *See Cisneros*, 692 S.W.2d at 84. In *Cisneros*, the court of criminal appeals also noted that the:

> Supreme Court held in the absence of the sort affirmative assurances embodied in the Mirands warnings, a state does not violate due process of law by permitting cross-examination as to postarrest silence when a defendant chooses to take the stand. A state is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony.

Id. at 85 (citing *Fletcher v. Weir*, 455 U.S. 603, 102 S.Ct. 1309, 71 L.Ed.2d 490(1982)).

[7,8] The record in this case does not indicate when appellant was given his *Miranda* warnings. Thus on original submission, we held that the prosecutor permissibly impeached appellant with his pre-*Miranda* silence because appellant had not been given his *Miranda* warnings triggering the federal protection against impeachment with post-arrest

silence under *Weir. See Brooks V. State*, 822 S.W.2d 765, 767-68 (Tex.App.-Houston [1st Dist.]), *rev'd on other grounds*, 854 S.W.2d 659 (Tex.Crim.App.1992) (applying *Cisneros* to post-arrest impeachment). However, after *Cisneros,* the court of criminal appeals held that the Texas Constitution provides additional protection to defendants, barring the use of post-arrest, pre-*Miranda* silence. *See Sanchez v. state,* 707 S.W.2d 575 (Tex.Crim.App.1986). When a defendant is arrested, he has the right to remain silent and the right to not have that silence used against him regardless of when he is advised of his rights. *Sanchez*, 707 S.W.2d at 580. Relying on *Sanchez*, appellant asserts that his silence was impermissibly used against him during trial because he was impeached with his post-arrest, pre-*Miranda* silence. We find, contrary to appellant's argument, that this case is not controlled by *Santez* because he opened the door to the prosecutor's cross-examination.

In *Sanchez*, the court of criminal appeals, quoting *Thompson v. State*, 88 Tex.Crim. 29, 224 S.W. 892 (1920), stated:

> It will be noticed that this [evidence of silence following arrest] was not the offered testimony of a statement that appellant had made, *but it was proving the fact that he made no statement*, especially the statement with reference as to how the shooting occurred. We are of the opinion that the court was in error in requiring appellant to answer the question. *He was asked nothing, and said nothing about the matter to the sheriff. It was simply a question of silence. It is therefore unnecessary to discuss what might have the attitude had he made a confession while under arrest and unwarned. That involves a different question.* Here we have a simple question presented that appellant may be impeached by failing

to make a statement, and in keeping silent at the time of his arrest and while under arrest. We do no think this is permissible.

Sanchez, 707 S.W.2d at 581 (grammatical markings in original and emphasis added). Unlike the defendant in *Sanchez*, appellant was not silent throughout the process. According to his testimony, appellant told the investigating officer "to take the saw into evidence." During direct examination, appellant testified:

Q: Did you tell any of the police officers about the saw?

A: Yes, I did.

Q: Which of the police officers did you tell about the saw?

A: Officer Tubbs.

Q; Which one was Officer Tubbs?

A: He was the officer that arrested me, came over to my apartment an took the gun.

Q: What did you tell Officer Tubbs?

A: I told him that-Well, he asked me if I had shot Bruce willingly or not and I kind of said, asked him what do you mean by willingly. I mean, I didn't want to shoot him.

....

Q: What else did you tell him?

A: I asked him to take the saw into evidence.

Q: What was his response to that?

A: He said that the investigators on the scene were professionals and they would take care of all of that.

Q: Were you interviewed by any of the other officers during that day?

A; No, I was not.

Appellant attempted to establish that the police ignored evidence that supported his theory of self-defense. By testifying on direct examination that he told the officer "to take the saw into evidence," appellant opened the door to cross-examination on this issue. *See Bell v. State*, 867 S.W.2d 985, 962 (Tex.App.-Waco 1994, no pet.)(holding that the defendant opened the door to impeachment on his post-arrest silence because he attempted to shore up his defensive strategy through questions about his post-arrest statements to police); *Buitureida v. State,* 684 S.W.2d. 133, 142 (Tex.App.-Corpus Christi 1984, pet. ref'd) (holding that the defendant was improperly impeached with his post-arrest silence when he gave an exculpatory story for the first time at trial, but also noting that the defendant did not invite the impeachment); *see also Lum v. State,* 903 S.W.2d 365,369 (Tex.App-Texarkana 1995, pet. ref'd) (defendant's testimony that police would not let him tell his side of the story opened the door to prosecutor's questions on cross-examination concerning post-arrest silence); *Mowbray v. State*, 788 S.W.2d 658 (Tex.App.-Corpus Christi 1990, pet. ref'd), *cert denied*, 498 U.S.1101, 111 S.Ct. 999, 112 L.Ed.2d 1082 (1991) (when invited, a prosecutor may refer to an accused's failure to testify); *Zetuche v. State*, 774 S.W.2d 697 (Tex.App-Corpus Christi 1989, pet. ref'd) (prosecutor's

closing argument which refers to the defendant's failure to testify is permissible when it is invited by defense counsel's closing argument). Thus, there was no error in the prosecutor's cross-examination of appellant impeaching the veracity of his exculpatory story presented at trial.

In order to satisfy the first prong of *Strickland*, appellant must demonstrate that counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms. Because the prosecutor's cross-examination on appellant's post-arrest silence was permissible, appellant's counsel was not deficient for failing to object. Appellant has failed to carry his burden of establishing the first prong of *Strickland*. Accordingly, we overrule his two points of error and affirm the judgment of the trial court.

APPENDIX B

Appellant's Motion for Rehearing Granted; Opinion of August 3, 1995, Withdrawn.
Affirmed and Corrected Opinion Filed September 7, 1995

THE SEAL OF THE STATE OF TEXAS

In The
Fourteenth Court of Appeals

NO. 14-93-00194-CR

HERMANN MICHAEL SZMALEC, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 180th District Court
Harris County, Texas
Trial Court Cause No. 623,412

CORRECTED OPINION

Appellant entered a plea of not guilty before a jury to the offense of murder. TEX.PENAL CODE ANN. § 19.02 (Vernon 1989).[1] He was convicted and the jury assessed punishment at imprisonment for 10 years, probated, and a

[1] The crime for which appellant was convicted was committed before September 1, 1994, the effective date of the revised penal code. *See* Acts 1993, 73rd Leg., ch 900, § 1.18(b). Therefore, all references to the penal code are to the code as in effect at the time the crime was committed.

$10,000 fine. In seven points of error, he complains of being impeached with his post-arrest silence, character evidence being admitted, the prosecutor's closing argument and the effectiveness of trial counsel. We affirm.

On June 9, 1991, appellant shot and killed Bruce Wackerle. Appellant testified at trial that he acted in self-defense. He testified that the events occurred as follows: Wackerle came by his house in the morning and asked to talk to him. Appellant talked with his girlfriend for awhile and then went to see Wackerle at Wackerle's near-by house. Because Wadkerle had threatened him on several occasions, he took a pistol with him. When he arrived, Wackerle was sawing boards with a power saw. After a short conversation, Waskerle attacked him with the saw and appellant responded by shooting him with the pistol. Wacerle dropped the power saw while it was still running. Appellant further testified that he had no means of retreat and he was acting in self-defense.

The state presented evidence and elicited testimony that appellant and Wackerle did not get along. Appellant's mother, Ursula Szmalec, owned three houses in the same area of town. Ursula lived in one of these houses, while appellant lived in another, and Wackerle had recently moved back into the third. Over the preceding decade, Ursula and Wackerle had developed a mother-son relationship. During most of the decade, Ursula allowed Wackerle to live in one of her houses. Approximately a week before the incident, Waskerle had returned from a detoxification program. Ursula had not informed appellant that Wackerle was back and living in one of her houses again. The state alleged at the trial that appellant was jealous of the relationship between Ursula and Wackerle.

Contrary to appellant's claim of self-defense, the state presented evidence that the incident occurred as follows: The

night before Wackerle was killed, appellant and his live-in girlfriend, had an argument. She went to Ursula's house to spend the night. During the night, Ursula told appellant's girlfriend that Wackerle had returned, but that she had not yet told appellant. The next morning, appellant's girlfriend told appellant that Wackerle had returned. Appellant got upset, grabbed a pistol and left the premises. Soon thereafter, Waskerle was shot. When Ursula heard the shot, she went into the backyard to see what happened. At trial, Ursula testified that appellant was "terribly pale" as he hurriedly walked away from the house where Wackerle was staying. According to her testimony, appellant said "That mother_____ tried to kill me." She asked "Who tried to kill you?" Appellant responded, "Just look over there on the driveway."

In a written statement given to the police on June 9, 1991, Ursula stated "When I saw my son, he was carrying a pistol in his right hand. My son looked very pale like death and he just passed me by and said 'it's done.' Then he told me look over there on the driveway." She admitted the statement was made and that her testimony was inconsistent with the statement, but contended she was tired when the statement was prepared and she did not freely sign the statement.

In his first five points of error, appellant complains of being impeached with his post-arrest silence, character evidence being admitted, and the prosecutor's closing argument. In his sixth and seventh points of error, appellant contends he did not receive effective assistance of counsel. Appellant admits in his ineffectiveness of counsel argument that his trial counsel failed to object to each incident complained of in his first five points of error. Without a timely and specific objection presented to the trial court, appellant has failed to preserve any error. TEX. R. APP. P.

52; *Wilkerson v. State* 874 S.W.2d 127, 131 (Tex. App.--Houston [14th Dist.] 1994, pet. ref'd).[2] Appellant's first five points of error are overruled.

In his sixth and seventh point of error, appellant contends that he did not receive effective assistance of counsel as required by the U.S. and Texas Constitutions. To support his points of error, appellant cites ten instances of allegedly ineffective assistance of counsel.

Where as appellant claims that he was denied effective assistance of counsel, we apply the two-prong *Strickland*[3] test. An appellant seeking relief under *Strickland* must demonstrate: 1) counsel's representation fell below an objective standard of reasonableness, based on prevailing professional norms; and 2) there is a reasonable probability that, but for counsel's unprofessional errors the result of the proceedings would have been different. A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome of the trial. *Miniel v. State*, 831 S.W.2d 310,323 (Tex.Crim.App.1992) *cert denied*, 113 S.Ct. 245, 1121 L.E.2d. 178 (1992). Both prongs of this test must be satisfied for appellant to prevail. *Strickland*, 466 U.S. at 686; *Bonilla v. State*, 740 S.W.2d. 583, 586 (Tex.App.--Houston[1st Dist.] 1987, pet.ref'd).

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[2] Since it was not raised by appellant, we will not address whether his first five points of error result in fundamental error that may be raised for the first time on appeal. *Hutch v. State*, 881 S.W.2d 92, 93 (Tex. App--Houston [1st Dist.]1994, pet. granted) (error is fundamental if "it so egregiously harms appellant that he is deprived of a fair and impartial trial"); *accord, Mathis v. State*, 858 S.W.2d 621, 622(Tex.App--Fort Worth 1993, pet. ref'd); *see also, Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App 1984)(op. on reh'g).

[3] *Strickland v. Washington*, 466 U.S. 668(1984).

Judicial scrutiny of counsel's performance must be highly deferential. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. 689. An ineffectiveness claim cannot be demonstrated by isolating one portion of counsel's representation. *McFarland v. State*, 845 S.W.2d 824, 843 (Tex.Crim.App. 1993), *cert denied*, 113 S.Ct.2937, 124 L.E.2d 686 (1993). Therefore, in determining whether the *Strickland* test has been met, counsel's performance must be judged on the totality of the representation. *Strickland*, 466 U.S. at 670.

In his first contention, appellant urges that his trial counsel was deficient because he failed to "voir dire the jury on the law of self-defense." In his ninth contention, appellant asserts that he was denied effective assistance of counsel because his triai counsel failed to object to the prosecutor improperly bolstering a witnesses during his closing argument. In his tenth contention, appellant alleged that his trial counsel was ineffective because he did not request a jury charge on the right to arm. In each of the three allegations, appellant cites a portion of the record, but does not explain how that portion of the record is error. In addition, he does not cite any authority in support of his argument. Because these contentions are not supported by argument or authority, appellant has failed to present anything for this court to review. TEX. R. APP. P. 74; *Ford v. State*, 870 S.W.2d 155, 157 (Tex.App.--SanAntonio 1993, pet. ref'd). Appellant's first, ninth and tenth contentions are overruled.

In his second contention, appellant urges that his trial counsel was ineffective for not objecting to the prosecutor improperly questioning him on his post-arrest silence. Appellant testified that he asked Office Tubbs to hold as evidence the saw that Wackerle allegedly used to attack him. Officer Tubbs, however, testified that the appellant never

made such a request. The prosecution attempted to impeach appellants testimony as follows:

Q: Now, wouldn't you agree with me, sir, that if somebody was trying to kill you and you had to kill them in self-defense, that it would be reasonable to tell witnesses that came around that the person tried to kill you and you had to kill him first? Wouldn't that be the reasonable thing to do?

A: I don't know if you know what it's like in that situation.

Q: Sir?

A: I don't know if--

Q: Wouldn't it be?

A: No.

Q: Don't you agree that that would be a reasonable thing to do?

A: No. I don't think you just go and start blabbing.

Q: You don't agree that would be a reasonable thing to do; correct?

A: The thing to do is--

[discussion between the court and counsel]

Q: Wouldn't you agree that that would be a reasonable thing to do.

A: What thing?

Q: To tell the first person when witnesses come around that he tried to kill me and I had to shoot him; I acted in self-defense?

A: No.

Q: Now, when you got back to your apartment you didn't called 911, did you?

A: No.

Q; You didn't ask [your girlfriend] to call 911, did you?

A: No.

Q: You didn't care whether Mr. Wackerle laid there and died or not, did you, Mr. Szmalec?

A: Yes, I did care.

Q: Now, you indicated that you told Officer Tubbs about a saw.

A: Yes, I did.

Q: Now, Officer Tubbs wasn't the only police office that you came into contact with that day, was it?

A: No, it wasn't.

Q: In fact, you came into contact with Officer Williams who did the atomic absorption test on your hands; is hat correct?

A: Yes, that's correct.

Q: And you didn't say anything to him about this guy coming at you with a saw, did you?

A: No, I didn't.

Q: You didn't say anything to Sergeant Anderson or Sergeant Ferguson about the guy coming at you with the saw, did you?

A: I don't recall any Anderson and Ferguson.

Q: When you were being transported downtown, you didn't say anything to that officer about the guy coming at you with a saw, did you?

A: No, I didn't.

Q: When you got downtown to the homicide division, you didn't say anything to any police officer about Mr. Waskerle coming at you with a saw, did you?

A: No, I didn't.

Q: Don't you believe -- Wouldn't you agree with me, Mr. Szmalec, that it would be reasonable for someone in that situation to continually let it be known that they acted in self-defense? Wouldn't you agree with that, Sir?

A: I had no one to talk to.

Appellant argues these questions were an impermissible comment on his post-arrest silence.

Once an accused is advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and invokes his right to remain silent, the Fifth Amendment to the U.S. Constitution prevents the state from impeaching him with his post-arrest silence. *Cisnero v. State*, 692 S.W.2d 78, 84 (Tex.Crim. App. 1985). *See also Doyle v. Ohio*, 426 U.S. 610 (1976).[4] The Fifth Amendment, however, "is not violated when a defendant, who testifies in his own defense, is impeached with his prior silence. Impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial." *Cisneros*, 692 S.W.2d at 84. In *Cisneros*, the Court of Criminal Appeals also noted that the:

> Supreme Court held in the absence of the sort affirmative assurances embodied in the *Miranda* warnings, a state does not violate due process of law by permitting cross-examination as to postarrest silence when a defendant chooses to take the stand. A state is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which postarrest silence may be deemed to impeach a criminal defendant's own testimony.

Id. at 85 (citing *Fletcher v. Wier*, 455 U.S. 603 (1982)). Under *Cisneros*, the state properly impeached appellant. Failure to object to properly admitted testimony is not error. *Jackson v. State*, 846 S.W.2d 411, 414 (Tex.App.--Houston [14th Dist.] 1992, no pet.) Accordingly, appellant's second contention of ineffective assistance of counsel is overruled.

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[4] The record does not reflect when or whether appellant was given *Miranda* warnings. The same situation was presented to the Court of Criminal Appeals in *Cisneros* and the Supreme Court in *Fletcher v. Wier*, 455 U.S. 603 (1982). *See Cisneros*, 692 S.W.2d at 85 n.5.

In his third, fourth, fifth, and seventh contentions of ineffective assistance of counsel, appellant complains of the prosecutor's closing jury argument. Proper jury argument falls within one four for general areas: 1) summation of the evidence; 2) reasonable deduction from the evidence; 3) answer to argument of opposing counsel; and 4) plea for law enforcement. *Cannon v. State*, 668 S.W.2d. 401, 404 (Tex.Crim.App. 1984); *Grant v. State*, 858 S.W.2d 29, 33 (Tex.App.--Houston [14th Dist.] 1993, no pet.); *Mader v. State*, 807 S.W.2d 439, 442 (Tex App.--Houston [14th dist.] 1991, pet ref'd). In order for improper jury argument to result in reversible error, the argument must be extreme or manifestly improper, violative of a mandatory statute, or harmful to the accused because new facts were interjected. *Cannon*, 668 S.W.2d at 404; *Mader*, 807 S.W.2d at 442. Erroneous jury argument is harmless unless there is a reasonable possibility that the allegedly improper argument contributed to the conviction. *Mader*, 807 S.W.2d. at 442. Finally, failure to object to improper jury argument generally does not reflect ineffective assistance of counsel. *Porter v. State*, 832 S.W2d 383, 385 (Tex.App.--Houston [1st Dist.] (1992, no pet.).

In his third contention of deficient trial counsel, appellant argues that it was error for his trial counsel to not object to the prosecutor improperly commenting on his post-arrest silence. As indicated in his second contention, the prosecutor properly impeached appellant with his post-arrest silence. Accordingly, the prosecutor's comment on that testimony during closing arguments was a proper summation of the evidence presented at trial. *McFarland*, 845 S.W.2d at 844. Appellant's third contention is overruled.

In his fourth, fifth, and seventh contentions, appellant alleges his trial counsel was deficient for failing to object to: 1) the prosecutor's "misstatement of the law of self-defense"

during his closing argument; 2) the prosecutor's argument that appellant provoked the difficulty; and 3) the prosecutor "interject[ing] new and harmful facts, unsupported by the record, into the case" during his closing argument. Specifically, he complains of the following:

> Let's assume that this man is right, that Bruce Wackerle was out there with a power saw. He knows about the problems he's had in the past with Mr. Szmalec. He knows His mother has told him don't let Michael know you're back. He's been having problems with this man over the years and he's out there minding his own business cutting wood, if you want to believe his side of the story; and he looks up and here comes this man with a gun. This man comes at him with a gun. He knows this man hates him. Who had the right to self-defense? I would submit to you it was Bruce Wackerle. And Bruce Waskerle, when he looked up and saw Hermann Szmalec coming at him with a gun, if you believe that he was out there with a saw as Mr. Szmalec would have you to believe, when he looked up, he stood up and maybe he did go after him with the only thing he had. He sees this man come at him with a gun. Maybe he did go after him. Maybe he did step toward him with a saw, if you want to believe he was out there with a saw. Who was the aggressor? He was. He came at him with a gun. He knew that Mr. Szmalec didn't want him living there. Again, he'd been told by Mrs. Szmalec don't let him know you're here. Bruce Wackerle had great reason to fear Hermann Szmalce, Hermann Michael Szmalec, ladies and gentlemen. The evidence has been proven. This case has been beyond a reasonable doubt there was no self-defense.

This argument is also within the scope of proper jury argument. Appellant's mother, Ursula, testified that she had not told appellant that Wackerle had returned. Appellant admitted during his testimony that he did not like Wackerle. Appellant also testified that he took a pistol with him to the encounter with Wackerle. The prosecutor's argument is based on the evidence presented at trial, reasonable deduction from that evidence and is an attempt to rebutt appellant's claim of self-defense. *Porter*, 832 S.W.2d at 386. Thus, the argument is proper and any objection would have been overruled. Trial counsel was not deficient for failing to object. *Id.* Appellant's fourth, fifth and seventh contentions are overruled.

In his sixth and eighth contentions, appellant argues that his trial counsel failed to object to the introduction of improper testimony. In his eighth contention, appellant alleges that his trial counsel failed to object to the introduction of hearsay testimony. He cites eighteen portions of the record that he argues are inadmissible and harmful hearsay. As with his first, ninth and ten contentions, appellant cites a portion of the record, but does not explain how that portion of the record is error or cite any authority in support of his argument. Thus, he has failed to present any error for this court to review on appeal. Tex. R. App. P. 74: *Ford*, 870 S.W.2d at 157. Nevertheless, we have reviewed the relevant portions of the record and have determined that most of the cited instances were either not hearsay under rule 801 or one of the hearsay exceptions applies. *See* Tex. R. Crim. Evid. 801; 803; 804.

In his sixth contention, appellant complains that his trial counsel failed to object when the state improperly introduced character evidence before he put his character in issue. He complains of the following testimony given by his mother during the state's case-in-chief:

Q: In fact, isn't true that your son was jealous of the relationship that Bruce Wackerle had with you?

A: No.

He also complains of the following testimony elicited during the prosector's cross-examination of him:

Q: And you were jealous of the relationship that Mr. Waskerle had with your mother, weren't you, Mr. Szmalec?

A: No, I was not.

Q: Over the period of time he lived there, you came to hate Mr. Wackerle, didn't you?

A: No.

Q: You didn't like him, did you?

A: No, I did not like him.

It is true that character evidence is generally not admissible to prove that a person acted in conformity with the character trait. Tex. R. Crim Evid. 404.[5] We, however, find any error in admitting the indicated testimony to not be sufficiently harmful as to render appellant's trial counsel ineffective. Isolated instances in the record of ommissions by trial counsel do not render the counsel's assistance ineffective. Failure to object to every introduction of improper evidence does not indicate that appellant's counsel was ineffective. *Fuentes v. State*, 832 S.W.2d 635,640 (Tex.App.--Houston [14th Dist.], pet. ref'd). Appellants sixth and eighth contentions are overruled.

In summary, we find appellant's trial counsel was not ineffective for failing to object to the ten instances cited by appellant on appeal. The minor errors which may have occurred in failing to object to hearsay testimony and character testimony do not render appellant's trial counsel ineffective. Considering the totality of the representation, we cannot say that appellant has shown by a preponderance of the evidence that the first prong of *Strickland* has been met. The fact that appellant's trial counsel made minor mistakes at trial does not show ineffective representation. *Perrett v. State*, 871 S.W.2d 838, 841-42 (Tex. App.--Houston [14th Dist.] 1994, no pct). We overrule appellant's sixth and seventh points of error.

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[5] The state argues that jealousy is not a character trait because it is an "isolated emotion, which may be fleeting, hardly encompass[ing] a person's moral qualities." Because of our disposition of appellant's contention, we do not need to address this issue. However, we note that the Fort Worth Court of Appeals has determined that evidence that a person accused of murder was possessive or jealous was inadmissible under rule 404. *See Richardson v. State*, 860 S.W.2d 214 (Tex.App.--Fort Worth 1993, no pet.).

The judgment of the trial court is affirmed.

/s/ Norman R. Lee
Justice

Judgment rendered August 3, 1995 and Corrected Opinion filed September 7, 1995. Panel consists of Justices Lee, Amidei, and Edelman.
Do Not Publish - Tex. R. App. P. 90

APPENDIX C

Petition for Discretionary
Review of the Fourteenth
Court of Appeals

HERMANN MICHEAL SZMALEC

[HARRIS County]

NO. 1198-95 v.

THE STATE OF TEXAS, Appellee

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

A jury convicted appellant of murder and assessed punishment at confinement for ten years, probated, and a $10,000 fine. The Court of Appeals affirmed appellant's conviction Szmalec v. State, No. 14-93-00194-CR (Tex.App. -- Houston [14th[delivered September 7, 1995).

Appellant has filed a petition for descretionary review contending, *inter alia,*, that the Court of Appeals erred by ignoring Appellents claim raised under the Texas Constitution and Sanchez v. State, 707 S.W.2d 575 (Tex.Cr.App. 1986)(plurality opinion), concerning impeachment of a defendant by his post-arrest silence.

We grant grounds one, two and three of appellent's petition for discretionary review concerning the issue of post-arrest silence under the Texas Constitution and a related claim of ineffective assistance of counsel. We remand this case to the Cour of Appeals to reconsider these issues.

PER CURIAM

Date Delivered: November 22, 1995
Do Not Publish

McCormick, P.J., - I dissent for the reasons set forth in my dissenting opinion in Autran v. State, 887 S.W.2d 31, 43-49 (Tex.Cr.App. 1994)(McCormick, P.J., dissenting). Mansfield J. joins.